In the Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners in this case are Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Certainteed Corporation, C.E. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials, Inc., I.U. North America, Inc., Maremont Corporation, Asbestos Claims Management Corporation, National Services Industries, Inc., Nosroc Corporation, Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N, plc, Union Carbide Corporation, and United States Gypsum Company. The other parties to the proceeding and petitioners' parent companies and nonwholly owned subsidiaries are set forth at App. 292a-317a.

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PETITION FOR A WRIT OF CERTIORARI

Amchem Products, Inc., et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the district court approving the settlement and certifying the class (App. 88a-276a) are reported at 157 F.R.D. 246.

JURISDICTION

The judgment of the court of appeals (App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (App. 283a-288a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rule of Civil Procedure 23 are set forth at pages 290a-291a of the appendix to this petition.

STATEMENT

This case involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos claims and more than one billion dollars in settlement payments. The court below characterized the settlement as "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue." App. 18a.

The Third Circuit nonetheless invalidated the settlement, holding that where the parties to a putative class action enter into a settlement, the court must act as if the settlement does not exist and apply the class certification criteria of Federal

Rule of Civil Procedure 23 "as if the case were to be litigated." *Id.* at 19a. In other words, the district court must decide a hypothetical case — not the case actually before it.

The Third Circuit's ruling throws the law governing class action settlements into complete confusion. Only a few weeks ago, the Fifth Circuit, reaffirming prior decisions, upheld an asbestos class action settlement, approving class certification because of the existence of the settlement and expressly disagreeing with the Third Circuit's "ignore-the-settlement" approach. Several other courts of appeals have also relied on the fact of settlement in applying Rule 23's certification criteria. The Third Circuit itself has recognized that its rule conflicts with the standard applied by the other courts of appeals.

This square conflict among the courts of appeals means that, until this Court resolves the issue, courts reviewing class action settlements cannot be sure what criteria to apply in deciding whether to certify a settlement class. Under the Third Circuit's rule, mass tort cases as well as virtually every other type of class action cannot be settled, but must go on through years of grinding litigation.

It is critically important for courts and litigants to know whether the Third Circuit's decision is right or wrong. Among the most important benefits of settlement are certainty and finality. The confusion created by the Third Circuit regarding a key element of the class action settlement equation means that parties will have neither — instead, the only sure consequence of a settlement, as in this case, will be more litigation. If the Third Circuit is wrong but its ruling remains unreviewed, the decision will unjustifiably deter parties from settling and force them unnecessarily to litigate these cases on the merits. If the Third Circuit is right and its approach ultimately prevails nationwide, parties that choose to enter into settlements in reliance on the decisions of other courts of appeals eventually will see those settlements overturned. This Court should grant review to clarify the

governing standard and prevent the enormous waste of both judicial and private resources that is the inevitable real-world result of these conflicting rulings.

Moreover, the issue arises here in a case of paramount importance. Allowing the Third Circuit's decision to stand unreviewed will trigger the filing of tens of thousands of claims against petitioners in the federal and state courts (those filings are stayed under an injunction issued by the district court to implement the settlement). The courts, litigants, and public will again be condemned to an asbestos litigation quagmire. This Court should decide whether the Third Circuit was correct in concluding that Rule 23 mandates that unpalatable result.

1. *Background and Settlement Negotiations.* This lawsuit and its settlement arose out of the nation's asbestos litigation crisis. The nature and extent of that crisis are well documented. Hundreds of thousands of cases have been filed; some 150,000 cases are pending in federal and state courts today; and new cases continue to flood the courts at a staggering and even accelerating pace (in 1995 alone, over 50,000 new claims were filed against some asbestos defendants).[1] The Judicial Conference Ad Hoc Committee on Asbestos Litigation, which was appointed by Chief Justice Rehnquist to examine the asbestos litigation crisis, found in 1991 that "the situation has reached critical dimensions and is getting worse." It summarized the nature of the problem as follows:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

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[1] See SEC Form 8-K, Owens Corning Corp., June 20, 1996, at 4-5.

Report at 3, quoted in *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991). Moreover, as courts have recognized, the "[r]esults of jury verdicts are capricious and uncertain" in asbestos cases — to the point where "[t]he asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure." *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir.) (citation omitted), cert. denied, 479 U.S. 851 (1986).[2]

The Judicial Conference Committee further concluded that "[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," citing a RAND Corporation finding that, "of each asbestos litigation dollar, 61 cents is consumed in transaction costs * * *. Only 39 cents were paid to the asbestos victims." Report at 13 (footnote omitted). These tremendous costs diminish the funds available to compensate future plaintiffs: "[u]nfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims. This situation demands immediate remedy." *Id.* at 14.

Against this background, the parties to the asbestos litigation were repeatedly urged by the federal judiciary and others to seek an "all-encompassing" settlement. App. 111a, 270a-271a. In 1991, at the request of eight district judges, the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for pretrial proceedings in hopes of fostering settlement of the "asbestos mess" (771 F. Supp. 415, 424). After that transfer, leaders of the plaintiffs' asbestos bar and counsel for all of the major asbestos defendants tried to achieve such a settlement (App. 113a). When those efforts deadlocked, the co-chairs of the plaintiffs' MDL Steering Committee and the 20 defendant companies in this

[2] As the district court found, the tort system's severe problems handling asbestos claims continue unabated today. App. 240a.

case negotiated a settlement of all future claims against these companies. As the district court found, those "difficult, lengthy" negotiations, conducted by sophisticated counsel with many years of experience litigating asbestos personal injury cases in the tort system, were "vigorous" and the settlement terms "changed substantially during the negotiations." *Id.* at 116a. In negotiating the settlement, these experienced parties were able to draw upon their "knowledge of this very mature litigation," as well as a uniquely massive historical record of jury awards and settlements (including confidential data that defendants shared with plaintiffs' counsel), and decades of discovery, medical evidence, and judicial review concerning claims of the kind advanced by the class. *Id.* at 116a, 239a.

2. *The Terms of the Settlement.* The 106-page settlement as finally negotiated covers all persons who have been occupationally exposed to asbestos but had not filed their own asbestos personal injury lawsuits before this case was initiated, a class that includes hundreds of thousands of persons. As the district court held in a detailed fairness decision that was not challenged in this appeal, the settlement establishes medical criteria that properly qualify a claimant for compensation if he or she contracts an asbestos-related condition. App. 112a-136a. The settlement then provides monetary compensation that varies with the severity of the condition and takes into account all of the factors that are taken into account in the tort system. *Id.* at 136a-139a. In the first ten years alone, up to $1.3 billion will be paid out under the agreement. *Id.* at 164a-165a. Claims for compensation will be resolved by a claims resolution system in far less time and with far lower transaction costs than in the tort system. *Id.* at 268a.

Persons who do not currently have an asbestos-related condition, as defined by the medical criteria, will receive compensation if they contract an asbestos-related condition in the future. In addition, such persons receive a set of present

benefits under the settlement that the district court found to have substantial value. Those include (1) the assurance of faster and less expensive resolution in the event of future claims; (2) the opportunity for individuals who have been compensated for non-malignant conditions to obtain further compensation if they later develop cancer or mesothelioma; (3) waiver of defenses to liability; and (4) tolling of statutes of limitations. App. 173a-176a. By contrast, as the district court found, the tort system typically gives such persons only "modest cash settlements" in exchange for giving up "all future rights by general releases." *Id.* at 173a.

As the district court concluded, the settlement terms establish the kind of claims resolution system endorsed by the Ad Hoc Committee appointed by Chief Justice Rehnquist to study the asbestos litigation crisis. App. 111a, 271a. Indeed, the reporter for the Ad Hoc Committee testified that the settlement comports with the Ad Hoc Committee's recommendations. See *id.* at 265. The settlement has been endorsed as fair and reasonable by the AFL-CIO and its Building and Construction Trades Department, which represent a substantial percentage of class members. *Id.* at 247a. The AFL-CIO also has a role in monitoring implementation of the settlement. *Id.* at 158a.

3. *District Court Proceedings*. After the proposed settlement was filed, the district court conditionally certified the class for settlement purposes only. App. 260a. Subsequently, the district court ruled that it had subject matter jurisdiction, 834 F. Supp. 1437, and approved a plan to give notice to the class, 158 F.R.D. 314. That plan was implemented at a cost of over $7 million and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by numerous unions to notify their members. App. 216a-223a. Thus, all class members were afforded a reasonable opportunity to opt out of the class. *Id.* at 216a-223a, 263a-267a.

After extensive pre-hearing discovery, the district court held a five-week hearing on the fairness of the settlement and the adequacy of representation. Five months later, it issued a thorough decision finding that (1) the requirements for class certification are met in light of the parties' settlement, App. 225a; (2) the settlement is fair, *id.* at 115a-176a, 234a-248a; (3) class counsel had no conflict of interest and provided vigorous representation of the entire class, *id.* at 262a; and (4) notice to the class satisfied Fed. R. Civ. P. 23 and due process, *id.* at 267a.

Based on the evidence adduced at the hearing, which included the 25-year record of asbestos litigation — "probably the most mature mass tort litigation in this country" (App. 115a) — the district court found that the settlement agreement's compensation schedule is a "reasonable reflection of [petitioners'] historical settlement averages from the tort system." *Id.* at 95a. In light of that determination, and its other findings regarding the benefits to the plaintiff class, the district court found the settlement fair and reasonable. *Id.* at 115a-176a, 234a-248a. Accordingly, the district court approved the settlement, stating (*id.* at 270a):

> The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today

will correct that unfair result for the class members and the CCR defendants.

The court subsequently enjoined class members from pursuing claims against the defendants outside of the settlement. *Id.* at 271a.[3] The parties have been operating under the settlement, processing and paying claims, for over two years.

4. *The Court of Appeals' Decision* The persons who objected to the settlement appealed the district court's preliminary injunction barring class members from instituting claims against petitioners. These parties did not challenge the district court's findings regarding the fairness of the settlement, but instead advanced a variety of constitutional contentions, including arguments based on due process, standing, and nonjusticiability doctrines; they also contended that the district court erred in granting the motion for class certification.

The court of appeals reversed, holding that the class certification violated Federal Rule of Civil Procedure 23 and that the settlement therefore had to be invalidated. App. 57a-59a. The basis for that decision was the court of appeal's conclusion that the district court had to determine whether the criteria for class certification, as set out in Rule 23, were "satisfied without taking into account the settlement, and as if the action were going to be litigated." *Id.* at 39a. The court conceded that "the better policy" may be to take the settlement into account, but held that the language of Rule 23 does not permit a court to do so. *Id.* at 19a, 39a.

Applying its new interpretation of Rule 23, the court of appeals then held that the class could not be certified for *litigation* of the asbestos personal injury claims being resolved in the settlement. App. 38a-57a. This meant, according to

[3] Because a third-party insurance claim remained pending, the district court's order took the form of a preliminary (rather than permanent) injunction.

the court, that the class cannot be certified for the purpose of *settling* those claims either.

For example, the court of appeals concluded that the class does not satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over individual questions because class members had different types of exposure to asbestos and "[d]ifferences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff"; moreover, "because we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." App. 41a (citation omitted). Even though the settlement eliminated the parties' dispute regarding *all* of these issues, the court concluded that those issues nevertheless still prevent the class from being certified.

The court of appeals denied the petitions for rehearing and suggestions for rehearing in banc filed by petitioners and by the named class representatives. Judge Scirica would have granted rehearing in banc. App. 283a-288a. The court of appeals stayed the issuance of its mandate pending the filing of a certiorari petition. *Id.* at 289a.

The result is that, on class certification grounds, the parties' hard-fought, fair, and urgently-needed settlement — a settlement approach that had been urged upon the parties by various federal district judges as well as by the Judicial Conference's Ad Hoc Committee — will be lost, unless this Court intervenes.

REASONS FOR GRANTING THE PETITION

There is a square conflict among the courts of appeals regarding the question presented. That conflict is starkly illuminated by the contrast between the Fifth Circuit's recent decision in *In re Asbestos Litigation*, 1996 WL 421990 (July 26, 1996), and the decision below. Both cases involve

nationwide settlements of asbestos claims; the Third Circuit concluded that the settlement could not be considered in determining whether a class could be certified, while the Fifth Circuit upheld class certification based on a legal standard that *required* consideration of the settlement. In addition, as the Third Circuit itself has acknowledged, other courts of appeals also have rejected its approach. This sharply different treatment of similarly-situated litigants creates an intolerable conflict — and severe unfairness — that this Court should resolve.

This issue does not arise only in connection with mass tort class action settlements. Courts frequently must decide whether to certify a class in the context of a settlement. The differing legal standards adopted by the courts of appeals create confusion regarding the proper rule and, by making settlements chancy propositions, will strongly discourage them. Respondents themselves "agree that this case involves issues of great importance and complexity." Response of Appellants Preston *et al.* to Motion to Third Circuit for Stay of Mandate at 5. Review by this Court is urgently needed.

A. The Third Circuit's Rule Conflicts With The Decisions Of Every Other Court Of Appeals That Has Addressed The Issue.

Every court of appeals that has addressed the question — other than the Third Circuit — has concluded that the existence of a settlement should be taken into account in applying the Rule 23 criteria. Indeed, the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995) (*GM Trucks*) (in an opinion also authored by Judge Becker), acknowledged that other courts of appeals have taken the existence of a settlement into account in upholding class certification. 55 F.3d at 798. It then went on to "disagree with th[at] approach." *Id.* at 799. The decisions of other courts of appeals, and other authorities, confirm the existence of the conflict recognized in *GM Trucks*.

1. The Fifth Circuit recently explicitly rejected the Third Circuit's approach, observing that "[m]ost circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied" and that "[o]nly the Third Circuit has refused to look at settlements before it when deciding class certification issues." *In re Asbestos Litig.*, 1996 WL 421990 at *9. The Fifth Circuit case involved a settlement class action also implementing a global resolution of asbestos-related claims that substitutes an administrative claims process for the tort litigation system. The Fifth Circuit concluded that it was "bound" by prior Circuit precedent to hold "that the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry," and added that it "would adopt this rule even if [it] were not bound by precedent because it enhances the ability of district courts to make informed certification decisions." *Id.* at *9 (citing *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir.), aff'd, 659 F.2d (1981), cert. denied, 456 U.S. 998 & 1012 (1982)). See also *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) (upholding a class certification for settlement purposes only and stating that "it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context") (citation omitted).

Other courts of appeals agree with the Fifth Circuit. *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989), for example, involved the settlement of tort claims of "literally hundreds of thousands of" persons alleging injury from the Dalkon Shield birth control device (*id.* at 740). One issue before the Fourth Circuit was whether "class certification for settlement purposes is permissible under Rule 23." *Id.* at 738. The court discussed several authorities addressing this issue, and reached precisely the opposite conclusion of the Third Circuit in the present case:

> If not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification. That is all the District Court did in this case. Its action in considering this circumstance would appear to have been appropriate.

Id. at 740. In upholding the district court's certification decision, the Fourth Circuit itself relied repeatedly on the existence of the settlement. See, *e.g.*, *id.* at 742-43, 744.

The Ninth Circuit also upheld class certification based on the existence of a settlement in *Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615 (1982). The court stated that it had "serious doubts, but no way of knowing, whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode." *Id.* at 633. Observing that it "[was] not, however, faced with that situation" and that "certification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light," the court of appeals approved the certification "[f]or purposes of the consent decree." *Ibid.* Other courts have recognized the same rule. See *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987); *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (relying upon the settlement agreement in upholding the district court's certification decision, specifically citing "the interests of the members of the broadened class *in the settlement agreement*") (emphasis added); *Weinberger* v. *Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (Friendly, J.) (recognizing that parties may "'compromise * * * class [action] issues'" through use of classes certified for settlement purposes) (citation omitted); see also *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (finding adequate class representation based upon "the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995).

2. The conflict among the courts of appeals is further confirmed by the numerous district court decisions relying on the existence of a settlement in granting requests for class certification. Thus, trial courts in the First,[4] Second,[5] Fourth,[6] Fifth,[7] Sixth,[8] Seventh,[9] Tenth,[10] and Eleventh[11]

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[4] *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308-09 (D. Mass. 1987) (even though certifiability of a litigation class would have been a "competitive question" on the facts of the case, that "is an issue that the parties may properly seek to compromise and settle").

[5] *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420, 426 (W.D.N.Y. 1994) (certifying settlement class while noting that Second Circuit had denied certification of a similar class for litigation purposes); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, at *14 (S.D.N.Y. Dec. 22, 1993) (certifying class "for settlement purposes only" while noting that there was "no guarantee" that class could have been certified for trial); *Chatelain* v. *Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (certifying settlement class and noting that certification would be contested for litigation purposes and that class faced risk of losing); *Smith* v. *Vista Org.*, 1991 U.S. Dist. LEXIS 10484, at *24 (S.D.N.Y. July 30, 1991) (certifying class "purely for the purposes of settlement" and noting that certification for litigation would have been "highly contested"); *In re Cuisinart Food Processor Antitrust Litig.*, 1983-2 Trade Cases ¶ 65,680 at p. 69,472 (D. Conn. 1983) (certifying settlement class even though "plaintiffs' liaison counsel admitted * * * the risk that a [litigation] class would not [have been] certified is a substantial one"); *Desimone* v. *Industrial Bio-Test Labs., Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (certifying settlement class even though the court had "twice denied certification" of a class for litigation purposes and "[w]ere a trial to replace settlement, the chances are very slim that" the class could have been certified); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (certifying settlement class even though question of certifying a litigation class "is neither easy nor free from doubt").

[6] *South Carolina Nat'l Bank* v. *Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990) (noting that, while the court had not determined whether a litigation class could be certified, "it is clear" that court could certify a settlement class); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp.

1379, 1390-91 (D. Md. 1983) (certifying settlement class even though court had twice denied certification of litigation class).

[7] *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960-61 (N.D. Ga. 1980) (certifying nationwide settlement class and approving settlement despite "serious doubts" that class could have been certified for litigation), aff'd, 669 F.2d 228 (5th Cir. 1982); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (certifying nationwide settlement class although there were "great" risks that class could not have been certified for litigation), aff'd in part and rev'd in part on other grounds, 645 F.2d 488 (5th Cir. 1981).

[8] *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992) (relying on existence of settlement in certifying nationwide settlement class in heart valve tort litigation and distinguishing case in which certification was denied on ground that it "dealt with a proposed class action for litigation"); *In re Dunn & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990) (same) (certifying class solely for settlement purposes while noting that certification for litigation would have been contested); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio) (certifying nationwide settlement class after denying certification of litigation class), rev'd on other grounds, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (noting but not reaching this issue).

[9] *Arenson* v. *Chicago Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. Ill. 1974) (certifying settlement class even though, absent the settlement, "it is quite possible that the plaintiffs' class would not have been certified, causing the death of this * * * litigation").

[10] *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899, at p. 90,470 (D. Colo. 1984) (certifying settlement class even though "there is doubt whether this action could be certified" for purposes other than settlement).

[11] *Woodward* v. *NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372, at *41 (S.D. Ala. May 23, 1996) ("it [was] not necessary to decide" whether the case could have been litigated as a class action, since "[i]t is well established that a court may certify a class for settlement purposes even where it could not certify the same class for litigation purposes"); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (relying on existence of settlement in

Circuits have certified a settlement class after declining to certify a litigation class or expressing doubt whether a litigation class could be certified.

3. Commentators confirm that the Third Circuit's decision creates a sharp conflict concerning the application of the Rule 23 criteria in the settlement context. For example, the leading treatise in the field, NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS (3d ed. 1992), states that "it is altogether proper * * * for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context" (*id.* § 11.27, at 11-55). That is because "[c]lass action determinations are made in the context of all the circumstances of the case as it is then postured." *Id.* at 11-54 to 11-55; see also *id.* § 11.28 (discussing the "different circumstances involved in the application of class action requirements in a settlement context, in contrast to a litigation mode" in "demonstrat[ing] why it is probably more difficult to satisfy these tests for litigation purposes").

Similarly, the MANUAL FOR COMPLEX LITIGATION (THIRD) (Federal Judicial Center 1995), recognizes that "courts permit the use of settlement classes," which involve the certification of the class "for settlement purposes only" and "permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved" (*id.* at 243). And the Judicial Conference Advisory Committee on Civil Rules observed at its meeting in April 1996 that taking the parties' settlement into account in applying the class certification criteria of Rule 23 "is the law everywhere, with the possible exception of the

certifying nationwide settlement class in breast implant tort litigation); *Sanders* v. *Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315, at p. 96,492 (N.D. Ga. 1990) (certifying class "for purposes of settlement only" after denying certification of litigation class, see 634 F. Supp. 1048 (N.D. Ga. 1986)).

Third Circuit." Reporter's Draft Minutes p. 198. The Third Circuit's status as the lone exception to the general rule was only "possible" when the Advisory Committee met in April, because the *GM Trucks* decision was not completely clear on this point. The decision below, rendered after the Advisory Committee's April meeting, eliminates any doubt about the Third Circuit's position.[12]

B. The Decision Below Will Have Severe Adverse Consequences Throughout The Federal Judicial System.

Settlement is the principal means of resolving civil litigation in the federal courts. *McDermott, Inc.* v. *Amclyde*, 114 S. Ct. 1461, 1469 n.22 (1994) ("[l]ess than five percent of cases filed in federal court end in trial," and "the bulk of the nontrial terminations reflect settlements"). That is particularly true in class actions. A recent study found that 84% of the cases in which a class was certified ended in settlement; nearly half of those settlements — and 39% of all

[12] This Court's denial of review in *GM Trucks* does not suggest that certiorari should be denied here. There was an express alternative and independent ground for the Third Circuit's decision in *GM Trucks* — the court of appeals' determination that the settlement in that case should have been disapproved under Rule 23(e) as unfair on its merits. See 55 F.3d at 804-19. Indeed, the certiorari petition in *GM Trucks* presented questions concerning both the court of appeals' certification ruling and its fairness determination, and the petitioner would have had to obtain review with respect to both issues — and prevail in this Court on both issues — in order to obtain reversal of the court of appeals' judgment. The respondents in that case urged this Court to deny review because the court of appeals' unfairness findings would be "unaffected by a ruling on the legal issues raised in the petition" and, therefore, "the class certification issues raised in the petition are unlikely ever to affect the class members or petitioner." See 95-2137 Br. in Opp. of Respondents Jack Frend, *et al.* at 14. The Rule 23 class certification issue raised by the present case thus was not squarely presented in *GM Trucks*. Moreover, as the Fifth Circuit's decision in *In re Asbestos Litigation* demonstrates, the conflict in the circuits has only intensified in the past year.

certified class actions — involved classes certified for settlement purposes only. Willging, Hooper & Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Rules 46 & Table 14A2* (Jan. 17, 1996 Draft).

As the foregoing study indicates, and the numerous citations to lower court decisions set forth above (see pages 13-15, *supra*) confirm, the question whether a class may be certified for settlement purposes arises routinely in all types of class actions litigated in the federal courts. Because the Third Circuit's decision creates confusion with respect to an issue that courts face with great frequency, this Court should grant review.

The Third Circuit's interpretation would essentially foreclose the use of class actions to settle mass torts and similarly complex cases. The great majority of courts have ruled that those kinds of cases cannot be certified for classwide *litigation*, given the myriad individualized injury, causation, and damages issues, as well as choice-of-law issues, that arise in trying such claims. See, *e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996) (decertifying a tobacco litigation class and citing numerous similar decisions involving other mass tort and other complex cases). The Third Circuit's interpretation of Rule 23 means that those kinds of cases cannot be certified for a classwide *settlement* either, because the decision below limits classwide settlements to cases that could be approved for classwide trial. As such, that interpretation eliminates an invaluable procedure for resolving many of the most burdensome kinds of cases confronting the federal courts.

The Administrative Office of the United States Courts recently reported that "the number of personal injury/product liability cases filed nationwide climbed 125 percent from the 12-month period ending March 31, 1995, compared to the corresponding period in 1996." *The Third Branch* at 2 (July 1996). The Third Circuit's decision will discourage parties

from seeking to pursue settlements of those cases, particularly given the enormous investment of time and resources required for such an effort. Moreover, at least two district courts may soon be faced with class settlements with respect to hundreds of thousands of tort claims. One such settlement already has been reached — and a class certified — with respect to breast implant claims. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 94-P-11558-S (N.D. Ala. Dec. 22, 1995) (order approving revised settlement program). Another class action settlement has tentatively been approved with respect to claims of hemophiliacs who allegedly contracted the AIDS virus from blood-clotting medications. *Payments to Hemophiliacs With AIDS Are Cleared*, WALL ST. J., Aug. 15, 1996, at B5. The Third Circuit's decision creates confusion and uncertainty regarding the viability of these and other similar mass tort settlements at the very time that the number of tort filings in the federal courts is skyrocketing.

In addition, the Third Circuit's newly-discovered limit on class action settlements will make it much more difficult to resolve *all* class actions on a consensual basis. Courts routinely consider the effect of the settlement in granting class certification in the settlement context. By requiring a district court also to decide that the class could be certified for purposes of litigation, the Third Circuit's ruling prevents parties from heading off any dispute as to whether the plaintiffs could obtain certification of a litigation class. *Real* settlements will fail because the court is forced to answer a *hypothetical* — and irrelevant — question.[13]

Indeed, under the test established by the Third Circuit the district court will *have to* determine that the case could be *litigated* as a class action — and make specific findings

[13] Requiring the district court in every settlement case to determine whether the case could have been litigated also will impose large additional burdens on the courts and the parties — such as the need to establish the manageability of litigating a case that in fact will never be tried.

justifying that conclusion (App. 19a). The defendant will therefore face a certified litigation class if the settlement ultimately falls apart or is disapproved. In addition, a defendant that did concede the class certification issue in order to settle a case will have to live with that concession in future litigated cases. No rational defendant would agree to settle in these circumstances. And even after that issue is determined, a defendant might continue to refuse to settle so as to preserve its right to appellate review. Because the Third Circuit's rule will thus deter all settlements — a result that is directly contrary to the established public policy favoring settlements — this Court should grant review.[14]

Finally, the instant case presents this major issue in a surpassingly important context — the asbestos litigation crisis. As noted above (at 4-5), the Ad Hoc Committee of the Judicial Conference found that the asbestos litigation problem "has reached critical dimensions and is getting worse" (Report at 2), and the court below recognized that, until this case, the problem had "defied global management in any venue" (App. 18a). The settlement at issue here thus represents a unique opportunity to unburden the federal and state courts of the "scourge" of asbestos litigation. Moreover, as the district court found, the terms of the settlement largely mirror the recommendations of the Ad Hoc Committee. *Id.* at 111a, 271a. The Third Circuit's ruling invalidates that settlement and requires burdensome case-by-case adjudication of these claims. Unless certiorari is granted, therefore, federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners over the next twelve months alone. See *Id.* at 108a (district court found new claims were filed against

[14] Ironically, the Third Circuit itself has recognized the importance of class certification for settlement purposes only as a means for resolving these disputes, *GM Trucks*, 55 F.3d at 778, 784, 790-792, but its legal standard effectively precludes that approach.

petitioners at the rate of 24,000 per year). That is particularly so because there is a two-year backlog of potential filings against petitioners built up over the period covered by the district court's injunction.

Respondents will likely argue before this Court, as they did in opposing rehearing in the court of appeals, that further review of this case is unwarranted because of a pending proposal to amend Rule 23. That argument is insubstantial.

Earlier this year, the Judicial Conference's Advisory Committee on Civil Rules recommended that Rule 23 be amended to make it clear beyond question that courts may certify a Rule 23(b)(3) class for the purpose of settlement even if such a class could not be certified for the purpose of litigation. The Committee did so specifically in order to confirm what already "is the law everywhere, with the possible exception of the Third Circuit," and to dispel any "uncertainties engendered by some readings of the [Third Circuit's *GM Trucks*] opinion." Reporter's Draft Minutes p. 198. The rules process thus was triggered by the Third Circuit's erroneous approach; intervention by this Court to correct the court of appeal's error therefore will avoid the necessity for a cumbersome and time-consuming use of the rule's amendment mechanism.

In addition, the proposed amendment is not a satisfactory cure for the problem caused by the Third Circuit's approach. Just recently, the Standing Committee on Rules of Practice and Procedure voted to send out the Advisory Committee's proposal for public comment. The Advisory Committee's proposal may not become law for any number of reasons, including the fact that it has sparked substantial controversy. But even if it were to be approved under the most expeditious of circumstances, it could not take effect until 1999 at the very earliest. This is so because the proposal must first be formally released, then await public comment (generally a six-month process), then be considered and approved by the Advisory Committee, the Standing Committee, the full

Judicial Conference, and this Court, and then placed before Congress for a seven-month period. See generally 28 U.S.C. §§ 2072-2074.

At minimum, the Third Circuit's decision will create inconsistency and confusion in the courts on a very important issue for years to come, as demonstrated by the striking contrast between the decision below and the Fifth Circuit's opposite conclusion just a few weeks ago in *In re Asbestos Litigation*; will have an immediate fatal impact on the extraordinarily important settlement at issue in this case; and will affect tens — or hundreds — of thousands of cases. Thus, it is essential that this Court intervene now to provide a definitive interpretation of the current version of Rule 23. See *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989) (interpreting Fed. R. Evid. 609(a)(1) despite pendency of Advisory Committee's proposed amendment addressing issue presented in that case); *Marek* v. *Chesny*, 473 U.S. 1 (1985) (same for Fed. R. Civ. P. 68).

Because of the general importance of the issue presented, and the specific importance of the settlement at issue in this case, certiorari should be granted.

C. The Third Circuit's Decision Distorts Rule 23.

Given the inconsistency of the holding below with the uniform decisions of the other courts of appeals, it comes as no surprise that the Third Circuit's analysis of the merits is insupportable. Under the Third Circuit's reasoning, "settlement class certification is not permissible unless the case would have been 'triable in class form.'" App. 36a (citation omitted). The court of appeals' approach thus makes certification turn on a wholly artificial inquiry — whether the requirements of Rule 23 would be satisfied in the imaginary circumstance that the case were litigated — and entirely disregards the actual situation presented to the district court by the settlement. It "require[s] a court to ignore important and relevant information that sits squarely in front of it when

deciding whether to certify a settlement class." *In re Asbestos Litig.*, 1996 WL 421990, at *9. This peculiar approach is flatly inconsistent with the language, history, and purposes of Rule 23.

1. The court of appeals' holding finds no support in the language of the Rule, which nowhere suggests that the existence of a settlement must be ignored, or that the district judge must apply the certification criteria to hypothetical litigation that assuredly *never* will occur. To the contrary, Rule 23 makes clear that the certification inquiry must be directed to the *actual* status of the proceeding.

Rule 23(b)(3), for example — the provision at issue in this case — provides that "matters pertinent to the [court's certification] findings include" such things as "the difficulties *likely to be encountered* in the management of the class action" (Rule 23(b)(3)(D) (emphasis added)) and "the extent and nature of any litigation *already commenced* by or against members of the class" (Rule 23(b)(3)(B) (emphasis added)). These factors "describe in practical and functional terms the occasions for maintaining class actions" (1 NEWBERG ON CLASS ACTIONS, §1.10 at 1-26), and plainly require consideration both of the actual status of the case and of the *real* manageability problems that will be confronted by the district court.

Indeed, this Court itself has observed that the commonality and typicality requirements of Rule 23 "serve as guideposts for determining whether *under the particular circumstances* maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982) (emphasis added). Similarly, under Rule 23(c)(1) a district court's view on certification may be "altered or amended" as the case progresses, which indicates that the court must evaluate certification in the light of *actual*

"developments in the litigation." *Id.* at 160. And needless to say, analysis of the "particular circumstances" of the case must involve a consideration of whether the parties have settled.[15]

The history of Rule 23 confirms this conclusion. The Third Circuit's rule, which applies the certification criteria to an abstract construct of hypothetical litigation while ignoring the real-world case before the court, closely resembles pre-1966 class action procedures, under which the propriety of a class action was determined by looking to "the abstract nature of the rights involved." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 98 (1966). But this analysis — which sought to categorize class actions as "true," "hybrid," or "spurious" — "proved obscure and uncertain" (*ibid.*), and it was replaced in 1966 by a rule that "substitute[s] functional tests for the conceptualisms that characterized practice under

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[15] Commentators agree that the language of the Rule permits certification of classes for settlement when certification for litigation would be inappropriate:

> Although the common question class action is generally not desirable for *trying* mass tort cases involving substantial claims, its use as a pretrial joinder device to facilitate group settlements is both proper and desirable. Its use is proper because Federal Rule of Civil Procedure 23 provides that the court may certify a common question class action when it will prove "superior to other available methods for the fair and efficient adjudication of the controversy." A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words "adjudicating," the value of claims arising from a mass tort. As a result, if conditional certification of the case as a common question class action for settlement purposes would enhance the prospects for group settlement, then [R]ule 23 authorizes certification.

Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 835 (1985) (emphasis in original; footnote omitted).

the former rule." 7A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE, § 1753, at 42 (1986).

The Advisory Committee therefore stressed that "[t]he *amended rule* describes in more practical terms the occasions for maintaining class actions." 39 F.R.D. at 99 (emphasis in original). Addressing Rule 23(b)(3), for example, the Committee explained that certification is appropriate where "convenient and desirable *depending upon the particular facts*." *Id.* at 102 (emphasis added). The Committee added that courts, in resolving certification requests, should disregard "interests that may be theoretic rather than practical." *Id.* at 104. This commentary, which "stress[es the] judicial economy objective of class actions" (1 NEWBERG ON CLASS ACTIONS, § 1.06, at 1-17), manifestly requires that the district court make the certification decision in light of the actual status of the case.

Indeed, contradicting the premise of its holding in this case, the Third Circuit itself recognized that the Rule 23 criteria ought to be applied in light of the actual circumstances before a court. Thus, interpreting the "commonality" requirement, the Third Circuit wrote (App. 43a):

> We proceed cautiously here because establishing a high threshold for commonality might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery.

2. The Third Circuit's holding also cannot be squared with the more general principles used to apply the Rules. Rule 1 provides that the Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." And so far as class actions in particular are concerned, there is a consensus that "the proper standard under Rule 23(b)(3) is a pragmatic

one." 7A WRIGHT, MILLER, & KANE, *supra*, § 1778, at 528. Thus, as Judge Wisdom wrote for the Fifth Circuit:

> The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. * * * Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context.

Beef Antitrust Litig., 607 F.2d at 177 (citation omitted); accord *A.H. Robins*, 880 F.2d at 740. In this case, of course, that rule of pragmatism is reinforced by what Judge Friendly termed "the general policy favoring the settlement of litigation." *Weinberger*, 698 F.2d at 73. See Burger, *Isn't There a Better Way*, 68 A.B.A.J. 274 (1982); Will, Merhige, & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976).

The benefits of class settlement in cases like this one are obvious: it vastly reduces transaction costs, provides comparable treatment to similarly situated individuals, and provides great benefits in judicial economy. See Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. LEGIS. 383, 401-406 (1993).[16] And it does so in a setting

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[16] The contrast with individual actions is particularly striking in the asbestos context. The Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation observed (at 13) that "[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease." The Committee also observed that "[t]he local trial of an individual asbestos claim takes so long that trying each claim separately would require all the civil trial time for the foreseeable future to the exclusion of all other cases in districts with heavy asbestos dockets." *Id.* at 19. The Committee accordingly found that "[c]lass action proceedings have the advantage of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds." *Id.* at 21-22.

where class members are *better off* than persons in litigated class actions, because in a settlement class case, class members are aware of the terms of the settlement at the time of certification and may opt out if they are dissatisfied. See *Beef Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981).

Yet the court of appeals — even while acknowledging that it may be "better policy * * * to take settlement into account" in the certification decision (App. 19a) — adopted an approach that is certain both to *preclude* the "speedy and inexpensive" determination of cases and to render settlement virtually impossible. As we have explained, the Third Circuit's rule effectively will prevent the settlement of *any* set of mass tort claims. That will deny both plaintiffs and defendants "a convenient and economical means for disposing of [repetitive] lawsuits." *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-403 (1980). The result is sure to accentuate the worst aspects of the existing tort system: "expense, delay, resulting crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued." Rehnquist, *Opening Remarks: National Mass Tort Conference*, 73 TEX. L. REV. 1523, 1524 (1995). Cf. Transgrud, *supra*, 70 CORNELL L. REV. at 831-832 ("The total litigation costs of most mass tort cases is enormous.").

3. In nevertheless adopting its rule, the Third Circuit, relying on its prior decision in *GM Trucks*, opined that "'[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes.'" App. 37a, quoting *GM Trucks*, 55 F.3d at 799. This observation, however, rests on a fundamental misunderstanding of the argument in support of certification here. As the leading commentator in this area has explained,

> courts, in approving class settlements * * * have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these tests were applied, and the observation that a different ruling might have resulted in the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context and thus may have led to a different result. Class action determinations are made in the context of all the circumstances of the case as it is then postured.

NEWBERG ON CLASS ACTIONS § 11.27, at 11-54 to 11-55 (emphasis added).

The Third Circuit also — and perhaps most fundamentally — was moved by its belief that certifying a class for settlement that could not be certified for litigation "perverts the class action process and converts a federal court into a mediation forum for cases that belong elsewhere." *GM Trucks*, 55 F.3d at 799. But the court failed to provide any justification for this ipse dixit. After all, Rule 23(b)(3) is concerned with the practicalities of managing a class action, and it is difficult to see how that interest is advanced in any respect by denying certification to concededly manageable settlement classes.

Similarly, there is no reason why the inquiry into adequacy of representation pursuant to Rule 23(a) must be conducted from the perspective of a hypothetical litigation class. The court of appeals' underlying concern — the danger that class counsel will feel pressure to enter into inequitable settlements (see *GM Trucks*, 55 F.3d at 796-797) — is addressed in a settlement class action by the searching review of the fairness of settlements that courts routinely undertake pursuant to Rule 23(e). See, *e.g.*, *Weinberger*, 698 F.2d at 73; *Beef Antitrust Litig.*, 607 F.2d at 173-74. Asking whether the class would have been certified for litigation adds nothing to this inquiry. Indeed, as a general matter, "in a settlement context, adequate representation for the class is presumptively present when the court finds that the settlement

is fair and adequate for the class and was negotiated at arm's length." 2 NEWBERG ON CLASS ACTIONS § 11.28, at 11-59.

> The courts of appeals thus have long understood that
>
> [i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

Corrugated Container, 643 F.2d at 212. See *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("adequacy of class representation * * * is ultimately determined by the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself").

Such a fairness inquiry is eminently manageable, particularly in cases involving "mature mass tort litigation" where "claim values can be established within a relatively narrow range of uncertainty." Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 949, 950 (1995). And that consideration has obvious relevance here, for the "leading example of mature mass tort litigation involves asbestos." *Id.* at 949. In fact, writing specifically of the settlement in this case, Professor Schuck observed:

> Here, a properly advised asbestos claimant can draw on a twenty-five-year history of jury awards and settlements in a wide variety of litigation contexts before deciding at the front end whether or not to remain in the class and, if so, whether to accept a particular settlement offer at

> the back end. Moreover, * * * the judge will be able to draw on this experience in determining whether to certify a class and whether to approve a settlement under Rule 23.

Id. at 966. See Edley & Weiler, *supra*, 30 HARV. J. LEGIS. at 402-403.

4. If the certification inquiry may take settlement into account, certification in this case assuredly was proper. The court of appeals did not suggest otherwise. Instead, the Third Circuit expressly indicated that it applied the Rule 23 factors "without taking into account the settlement." App. 39a. The court's finding that the requirements of Rule 23(b)(3) were not met thus turned entirely on its conclusion that litigation of the action would be unmanageable. See App. 42a-47a, 53a-55a. But viewed from the perspective of the settlement, the common issues (the fairness of the claims resolution system, of the medical criteria, and of the compensation payments) plainly predominate, as the district court found (App. 226a). See generally 2 NEWBERG ON CLASS ACTIONS § 11.28, at 11-58.

By the same token, the Third Circuit's insistence on applying all of the Rule 23 factors "without taking into account the settlement" (App. 48a-51a) equally infected its conclusion that class members hypothetically had different interests in pursuing their claims, thereby rendering class counsel inadequate. The district court, properly taking the settlement into account, made unchallenged factual findings that — in the real world rather than the world of theory — "there is no antagonism of interest" between class members (*id.* 230a) and the settlement is fair to the class as a whole. See *id.* at 115a-176a, 234a-248a. Indeed, commentators (including the chief reporter for the American Law Institute's tort reform project) have praised the settlement in this case as one that "addressed the major pathologies of the present system and adopted a significantly improved method for delivering compensation to future victims of asbestos

exposure," while "secur[ing] important gains for both sides." Edley & Weiler, *supra*, 30 Harv. J. Legis. at 405. See *id.* at 407 ("we firmly endorse the fairness and adequacy of this settlement of future asbestos claims"). In these circumstances, the decision below should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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